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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JENNIFER WHITNEY,

Plaintiff and Respondent,

v.

PLAYBOY ENTERTAINMENT GROUP,
INC.,

Defendant and Appellant.

B182230

(Los Angeles County
Super. Ct. No. BC 296518)

Appeal from an order of the Superior Court of Los Angeles County. Ricardo A. Torres, Judge. Affirmed.

Glassman, Browning & Saltsman, Inc., Anthony Michael Glassman and Alexander Rufus-Isaacs for Defendant and Appellant.

Law Offices of Cyrus & Cyrus, Cyrus John Nownejad and Donna M. Boris for Plaintiff and Respondent.

* * * * *

Appellant Playboy Entertainment Group, Inc. (Playboy), appeals from an order of the trial court denying Playboy's Code of Civil Procedure section 425.16¹ motion to strike respondent Jennifer Whitney's (Whitney) second amended complaint. We affirm.

CONTENTIONS

Playboy contends that: (1) Whitney's claims arise out of Playboy's exercise of its free speech rights on a public issue; (2) Whitney cannot meet her burden of establishing a probability of prevailing on her claims; and (3) Playboy is entitled to its attorney fees and costs under Civil Code section 3344.

FACTS AND PROCEDURAL HISTORY

Whitney filed a second amended complaint (SAC) for: (1) misappropriation (Civ. Code, § 3344); (2) common law misappropriation; (3) false light; (4) fraud; (5) unjust enrichment; and (6) quantum meruit.

The SAC alleged the following. In 2001, Whitney was hired by Playboy to dance and serve drinks at the Midsummer Night's Dream party at the Playboy Mansion, wearing only body paint. She had worked other similar events in the past. Events at the Playboy Mansion were private gatherings, not open to the general public. Playboy strictly forbade photography, filming, or recording inside the Playboy Mansion. No one was allowed to record events for publication or sale to the general public. At previous events where Whitney had been hired to dance, Playboy informed her that she would be videotaped solely so that guests could view the videotapes contemporaneously on television monitors inside the Playboy Mansion. In preparation for the subject party, Whitney and other models were painted in the gym area of the Playboy Mansion. The painting was conducted in private and the gym was closed to party guests. Whitney was openly videotaped while being painted in the gym. She was also given a release form to sign. Whitney did not sign the release and later threw it into a trash can in the gym.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Playboy subsequently produced two videos for sale, entitled “Playboy Mansion Parties, Behind the Scenes,” and “Playboy Mansion Parties, Body Painting.” Whitney’s picture appeared twice on the front cover of one videotape box and once on the other videotape box. Throughout the videos, she appeared nude and in different stages of having paint applied to her body. The videos also contained scenes of women masturbating, kissing, and undressing each other at a different party, filmed on a different night.

Playboy filed a motion to strike the SAC under section 425.16. In support of its motion, Playboy attached the declaration of a paralegal who attested that her search of “Playboy Mansion” on the internet yielded 503 hits. It also attached the deposition of a Playboy employee who stated that on the night of the party, he gave the models, including Whitney, a release to sign, which she did.² He stated that the cameraman explained to the models that they were giving Playboy “the right to show you on camera.” Playboy also cited Whitney’s deposition testimony in which she stated that she “supposed,” but was not sure, that the paper she was handed was a release. In opposition to the motion, Whitney attached her declaration stating that Playboy represented that it did not permit videotaping except by Playboy employees documenting the party for their private use. Prior to being body painted, she refused to sign what she thought was a release handed to her by an employee of Playboy, threw it in the trash, and did not consent to the use of her image on the covers or in the videos.

The trial court denied Playboy’s motion to strike under section 425.16.³ This appeal followed.

² Playboy asserts that it cannot find the signed release because it moved its Los Angeles office.

³ Playboy filed and withdrew a motion to strike under section 425.16 against Whitney’s first amended complaint. Its subsequent motion to strike the SAC was denied by the trial court.

DISCUSSION

I. Section 425.16 was designed to dismiss nonmeritorious claims at an early stage

Section 425.16, subdivision (a) was enacted as a result of “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech” and to “encourage continued participation in matters of public significance.” (§ 425.16, subd. (a).) These SLAPP⁴ suits “are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.” (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) “The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants’ continued political or legal opposition to the developers’ plans.” (*Wilcox v. Superior Court, supra*, 27 Cal.App.4th at p. 815.) Moreover, SLAPP suits are brought to obtain an economic advantage over the defendant, tying up his or her resources, rather than to vindicate a legally cognizable right of the plaintiff. (*Wilcox, supra*, at p. 816.)

Section 425.16 permits a court to dismiss certain nonmeritorious claims in the early stages of the lawsuit. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) Under section 425.16, subdivision (b)(1), “[A] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

Thus, in determining whether to grant or deny a section 425.16 motion to strike, the court engages in a two-step process. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) First, the court must decide whether the defendant has met his or her threshold burden of showing that his or her acts arose from protected activity. (§ 425.16, subd. (b)(1);

⁴ SLAPP stands for strategic lawsuit against public participation.

Navellier, supra, at p. 88.) These acts include, among other things, any conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).) If the defendant meets his or her burden of showing that the activity is protected, then the court determines whether the plaintiff has carried his or her burden of showing that there is a probability that he or she will prevail on the claim. (§ 425.16, subd. (b)(1); *Navellier, supra*, at p. 88.)

On appeal, we independently review whether section 425.16 applies and whether the plaintiff has a probability of prevailing on the merits. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

II. *The publication and dissemination of the videos was not a matter within the public interest*

A. Playboy has not made a prima facie showing that Whitney was a public figure

At issue here is whether the videos included conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e).) Playboy contends that the videos were protected free speech and were matters of widespread public interest. While Whitney concedes that the videotapes were protected free speech, we agree with her argument that the videos were not created in connection with a public issue or an issue of public interest as required for protection under section 425.16, subdivision (e)(4). Specifically, we find that Whitney was not a public figure and the videotapes were not matters of widespread public interest. To hold otherwise would not be in keeping with the legislative intent of section 425.16.

A public issue is implicated if the subject underlying the claim: (1) was a person in the public eye; (2) could directly affect a large number of people beyond the direct participants; or (3) was a topic of widespread public interest. (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33.) Playboy argues

that a public issue is implicated because both Playboy and Hugh Hefner were in the public eye. While we agree that Playboy and Mr. Hefner have gained notoriety with the public over the years, their status is not pertinent to our analysis. Whitney herself was not a public figure or closely connected with those who are well known. “[A] public figure is a person who has assumed a role of special prominence in the affairs of society, who occupies a position of persuasive power and influence, or who has thrust himself to the forefront of a particular public controversy in order to influence the resolution of the issues involved.” (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1131 (*Weinberg*).) Whitney was none of these.

Whitney, a part-time waitress and bikini model, was in her 20’s at the time of the body-painting incident. She did not have an agent, website, or fan club. Nor had she ever posed for catalogues or sold photographs of herself. She was merely one of a group employed to dance at a private party, closed to the public. (*Weinberg, supra*, 110 Cal.App.4th at p.1132 [private, anonymous token collector was not a public figure].)

Whitney’s agreement to dance at a private party or to be photographed with Mr. Hefner for what she believed was for private use, does not make her a public figure. “A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.” (*Wolstan v. Reader’s Digest Assn., Inc.* (1979) 443 U.S. 157, 167; *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 266 [a photojournalist is not a public figure because he was photographed near Robert F. Kennedy moments before Kennedy’s assassination].) Playboy’s citation to *Carlisle v. Fawcett Publications, Inc.* (1962) 201 Cal.App.2d 733, 746-747 for the proposition that persons who are closely related to public figures in their activities, lose their right to privacy to some extent, is not persuasive. (*Id.* at p. 747.) In that case, the plaintiff objected to articles about his early marriage to the famous actress Janet Leigh. No privacy interests were implicated because the marriage was of public record, and to a very public persona. (*Ibid.*) There was no such close, consensual association between Whitney and Mr. Hefner.

We conclude that Playboy has not made a prima facie showing that Whitney was a public figure.

B. Playboy has not made a prima facie showing that parties at the Playboy Mansion involve a topic of widespread public interest

We disagree with Playboy that Mr. Hefner's activities or parties at the Playboy Mansion involve a topic of widespread public interest within the meaning of section 425.16.

Public interest does not equate with mere curiosity. (*Weinberg, supra*, 110 Cal.App.4th at p. 1132.) Topics of widespread public interest must in some manner contribute to the public debate and be of concern to a substantial number of people, rather than to a relatively small, specific audience. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898; *Weinberg, supra*, at p. 1132.) The challenged statement and the asserted public interest must have some degree of closeness and the assertion of a broad and amorphous public interest is not sufficient. Moreover, the focus of the speaker's conduct should be a matter of public interest. (*Weinberg, supra*, at p. 1132.) If the issue is only of interest to a limited, but definable portion of the public (such as a private group, organization, or community), the activity must "occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119.) Examples of topics which courts have found to be of widespread public interest under section 425.16 include domestic violence (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226); development of a mall with potential environmental effects (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15); and child molestation in youth sports (*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623).

We reject Playboy's argument that media coverage of Mr. Hefner, or parties at the Playboy Mansion are matters of public interest by virtue of Mr. Hefner's celebrity status. Celebrity watching is not inherently a public issue. (*Rogers v. Home Shopping Network*,

Inc. (1999) 57 F.Supp.2d 973, 985, fn. 7.) “That a celebrity might be a public figure for purposes of the First Amendment should not mean that all speech about that celebrity is necessarily a public issue or an issue of public interest for purposes of § 425.16(e).” (*Ibid.*)

Nor do we agree with Playboy’s next point that the Playboy Mansion, parties at the Playboy Mansion, and Mr. Hefner are topics of public interest based on *Seelig v. Infiniti Broadcasting Corp.* (2002) 97 Cal.App.4th 798. In that case, the First District recognized that a public issue is one of significant interest to the public and the media. There, the plaintiff filed an action against a broadcasting corporation for, among other things, slander and invasion of privacy, arising out of a radio broadcast discussing the plaintiff in unflattering terms for appearing on the reality television program *Who Wants to Marry a Multimillionaire*, and questioning “why she wants to marry some random guy.” (*Id.* at p. 802.) The court found that the television show was of significant interest to the public and the media, and had generated considerable debate concerning the condition of American society, including the willingness of a person to marry a complete stranger on national television for financial rewards and notoriety. (*Id.* at pp. 807-808.) By appearing as a contestant on a nationally televised program, the plaintiff had “voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media.” (*Id.* at p. 808.)

Seelig has no application here. Whitney did not appear in videos that would generate debate on pressing issues regarding American society. The subjects of body painting or parties at the Playboy Mansion simply are not of widespread public interest or designed to encourage participation in matters of public significance. The videos were not instructional tapes on body painting or documentaries designed to provoke a general discussion on the mores of Mr. Hefner, the merits of body painting, masturbation, or lesbian activities. Assuming that the videos were of interest to a small, definable community, Playboy has not shown an ongoing controversy, debate, or discussion as required under *Du Charme v. International Brotherhood of Electrical Worker*, *supra*, 110 Cal.App.4th at page 119. To the contrary, these were videos designed to appeal to the

prurient interests of a certain group of viewers. Furthermore, unlike the plaintiff in *Seelig*, Whitney's public appearance was not voluntary. She did not agree to appear nude in public. She agreed to be body painted in a private gym adjacent to the Playboy Mansion, and then to dance and serve drinks to those in attendance at the party.

III. *No need for Whitney to show probability of prevailing*

We conclude that Playboy has not established that the videos were matters of public interest within the meaning of section 425.16, subdivision (e). Having so concluded, we need not reach the issue of whether Whitney has carried her burden of showing that there is a probability that she will prevail on the claim. Accordingly, we need not address Playboy's contention that, as the prevailing party, it is entitled to attorney fees and costs under Civil Code section 3344, subdivision (a).

DISPOSITION

The judgment is affirmed. Respondent shall receive costs of appeal.

NOT FOR PUBLICATION.

J.
CHAVEZ

We concur:

P. J.
BOREN

J.
DOI TODD